FILED
001258 JAN 29 2001

Record No. _____

In The Supreme Court of the United States

CHRISTOPHER THOUSAND,
Petitioner,

v.

STATE OF MICHIGAN,
Respondent.

On Petition for a *Writ* of *Certiorari* to the Michigan Supreme Court

PETITION FOR A *WRIT* OF *CERTIORARI*

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January 29, 2001

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QUESTIONS PRESENTED FOR REVIEW

1. Is MCL 750.145c(2); MSA 28:342a(2), which permits the conviction of a person for a felony punishable by 20 years in prison if that person "prepares . . . to arrange for . . . any child sexually abusive activity," but which does not define the terms "prepares" or "arrange for," so vague and overbroad as to violate the First and Fourteenth Amendments to the United States Constitution?

2. Does a state violate the Due Process Clause of the Fourteenth Amendment by criminalizing the mere preparation or arranging for criminal activity, when the well-established historical practice of the common law and state law has long drawn a distinction between an attempt and the mere preparation to commit a crime?

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OPINIONS AND ORDERS BELOW

The order of the Michigan Supreme Court denying the application of Petitioner Christopher Thousand to appeal to that court, dated October 31, 2000, will not be published. It is set out in the Appendix at page A-1. The decision of the Michigan Court of Appeals, dated May 12, 2000, is set out in the Appendix at page A-3. The ruling of the Wayne Circuit Court, dated May 28, 1999, appears in the Appendix at page A-22.

STATEMENT OF JURISDICTION

The final order of the Michigan Supreme Court from which this action is taken was issued on October 31, 2000. In that order, the Michigan Supreme Court denied Petitioner Christopher Thousand's Application for Leave to Appeal as Cross-Appellant, thus upholding the May 12, 2000 decision of the Michigan Court of Appeals. The Michigan Court of Appeals had reversed the trial court's dismissal of a criminal charge against Thousand based on MCL 750.145c(2); MSA 28:342a(2), which permits the conviction of an individual who "prepares . . . to arrange . . . for any child sexually abusive activity." The Michigan Supreme Court thus rejected Thousand's argument to that court that the statute was unconstitutionally vague and overbroad under the First and Fourteenth Amendments. In the same order, the Michigan Supreme Court granted the appeal of the State of Michigan concerning the dismissal by the trial court of two other charges against Thousand based on the defense of legal impossibility,

on which the Michigan Court of Appeals had ruled favorably for Thousand by affirming the trial court's order of dismissal. Under 28 U.S.C. § 1257 and under the doctrine of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court has jurisdiction over the final order of the Michigan Supreme Court with regard to the federal constitutional issue in the case, even though the Michigan Supreme Court retained jurisdiction over two state law issues in the case. Under *Cox Broadcasting*, a judgment of the highest state court on a federal issue is final for purposes of Supreme Court review, notwithstanding that there are further proceedings yet to occur in the state court, where the federal claim has been finally decided and later review of the federal issue cannot be had, whatever the ultimate outcome of the case. *Id.* at 481 (citing *California v. Stewart*, 384 U.S. 436 (1966)). This case presents precisely such a situation, because the decision of the Michigan Supreme Court on the federal constitutional issues is final and the vagueness and overbreadth challenges can no longer be raised by Thousand in state court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution states:

> Congress shall make no law . . . abridging the freedom of speech[.]

The Fourteenth Amendment to the Constitution states in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MCL 750.145c(2); MSA 28.342a(2) provides:

> A person who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material, or a person who arranges for, produces, makes, or finances, or a person who attempts or prepares or conspires to arrange for, produce, make, or finance any child sexually abusive activity or child sexually abusive material is guilty of a felony, punishable by imprisonment for not more than

20 years, or a fine of not more than $100,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know that the child is a child, or that person has not taken reasonable precautions to determine the age of the child.

STATEMENT OF THE CASE

Petitioner Christopher Thousand was charged by information in the Circuit Court of Wayne County, Michigan, on three counts: (1) commission of child sexually abusive activity, in violation of MCL 750.145c(2); MSA 28.342a(2); (2) solicitation to commit third-degree criminal sexual conduct, in violation of MCL 750.157b(3)(a); MSA 28.354(2)(3)(a), and attempted distribution of obscene material to a minor, in violation of MCL 750.92; MSA 28.287, and MCL 722.675; MSA 25.254(5). Each charge arose from four electronic Internet conversations between Thousand and William Liczbinski, a Wayne County Sheriff's Deputy who was pretending to be a 14-year-old girl. During the course of the Internet conversations, Thousand made several sexually suggestive remarks to Liczbinski indicating his desire to have sexual relations with Liczbinski and, at one point, sent a picture of his penis to Liczbinski through the Internet. In their final conversation, Thousand and Liczbinski agreed to meet at a McDonald's in the Bel-Air Shopping Center in Detroit, and Thousand told Liczbinski what kind of car he would be driving and what he would be wearing. When Thousand entered the

McDonald's, he was immediately identified by Liczbinski and was arrested.

Prior to trial in the Wayne Circuit Court, Thousand moved to quash the information and to dismiss the case on the grounds that each charge against him required the existence of a minor victim or potential victim, and the nonexistence of such a minor in his case precluded his conviction. On May 28, 1999, the trial court granted Thousand's motion to quash with regard to each count, ruling that the existence of a minor was indeed an element of each offense and thus it was impossible for the state to prove all of the elements of the crimes with which Thousand was charged.

The state appealed the dismissal of the case to the Court of Appeals, which, in a decision dated May 12, 2000, upheld the decision of the trial court with regard to the counts charging solicitation to commit third-degree criminal sexual conduct and attempted distribution of obscene material to a minor, but reversed the ruling of the trial court with regard to the charge of child sexually abusive activity. (App. at A-3.) The Court of Appeals upheld the charge of child sexually abusive activity against Thousand by stating that the statute did not merely punish engaging in child sexually abusive activity, but rather punished the preparation for any child sexually abusive activity, and held that Thousand could prepare for child sexually abusive activity even where no minor was involved.

The State of Michigan then filed an Application for Leave to Appeal with the Michigan Supreme Court, arguing that the Michigan Court of Appeals had erred in upholding the dismissal of two counts on the basis of impossibility, and contending that the Michigan Supreme Court should repudiate the defense of legal impossibility in all cases. Thousand responded with an Application for Leave to Appeal as Cross-Appellant, arguing that the language of MCL 750.145c(2); MSA 28.342a(2) was vague, ambiguous, and overbroad on its face and thus was violative of the First and Fourteenth Amendments to the United States Constitution. (App. at A-23.) The Michigan Supreme Court denied Thousand's Application for Leave to Appeal as Cross-Appellant, thus creating a final judgment on the federal constitutional issues raised by Thousand. (App. at A-1.)

REASON FOR GRANTING THE WRIT

THE DECISION OF THE MICHIGAN SUPREME COURT SQUARELY CONFLICTS WITH THIS COURT'S ESTABLISHED PRECEDENT HOLDING THAT IMPRECISE CRIMINAL STATUTES VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS, AND IT PERMITS IMPERMISSIBLE INFRINGEMENT OF THE USE OF THE INTERNET AND OF OTHER LEGITIMATE ACTIVITIES.

I.

This Court has long recognized that imprecisely worded criminal statutes violate the United States Constitution in two ways. First, a law that inhibits the exercise of First Amendment rights is overbroad and violative of the First Amendment if the impermissible applications of the law are substantial when judged in relation to the legitimate sweep of the statute. *City of Chicago v. Morales*, 119 S. Ct. 1849, 1857 (1999); *Broadrick v. Oklahoma*, 413 U.S. 601, 612-15 (1973). Second, even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and the public that are sufficient to guard against the arbitrary deprivation of liberty interests. *City of Chicago v.*

Morales, 119 S. Ct. at 1857; *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

In recent years, this Court has recognized that it has a duty to enforce these important constitutional principles and has accepted for review a number of cases involving vague legislative enactments in various factual contexts. In *City of Chicago v. Morales*, for example, this Court determined that a city ordinance was impermissibly vague on its face and thus violated the Due Process Clause of the Fourteenth Amendment because it prohibited "criminal street gang members" from "loitering" with one another or with other persons in any public place. The term "loiter" was defined in the ordinance to mean "to remain in any one place with no apparent purpose." This Court determined that because of this limiting, "no apparent purpose" language, the law did not have a sufficiently substantial impact on conduct protected by the First Amendment to render it unconstitutionally overbroad. However, the Court did find that the ordinance failed to provide the kind of notice that would enable ordinary people to understand what conduct it prohibits, because of the law's "failure to distinguish between innocent conduct and conduct threatening harm." 119 S. Ct. at 1859. This Court also found that the ordinance provided no guidelines to govern law enforcement, and effectively "provides absolute discretion to police officers to determine what activities constitute loitering." *Id.* at 1861.

Significantly, the Court emphasized in *City of Chicago v. Morales* that the ordinance could not be rescued by the courts, acting as interpreters of the meaning of the terms in the ordinance, noting that as in all such vagueness cases, "[t]he Constitution does not permit a legislature to 'set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.'" *Id.* at 1861 (quoting *United States v. Reese*, 92 U.S. 214, 221 (1876)).

The *City of Chicago* case is but one of many decisions of this Court in the past few decades which have attempted to guide the courts with regard to the protection of citizens from the unfair application of vague and ambiguous laws. *See, e.g., Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513 (1994) (federal criminal statute outlawing sale of drug paraphernalia was not vague because of scienter requirement and examples of prohibited items contained in statute); *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123 (1992) (a county ordinance prohibiting private demonstrations on public property without a valid permit, accompanied by a fee determined by the county administrator, was unconstitutionally vague because the permit process provided no standards by which to determine whether a permit should be issued, and what fee should be imposed); *Colautti v. Franklin*, 439 U.S. 379 (1979) (statute which required person performing abortion to make determination "based on his experience, judgment, or professional competence that the fetus is not viable," and to adopt that abortion technique "which would provide the best

opportunity for the fetus to be aborted alive so long as a different technique would not be necessary in order to preserve the life or health of the mother" was unconstitutionally vague both as to its requirement for determining viability and its requirement as to standard of care); *Kolender v. Lawson* (statute that required person who loitered or wandered on streets to provide credible and reliable identification and to account for their presence when requested by peace office under circumstances that would justify valid stop was unconstitutionally vague on its fact because it encouraged arbitrary enforcement); *Papachristou v. Jacksonville*, 405 U.S. 156 (1972) (municipal ordinance criminalizing "persons wandering or strolling around from place to place without any lawful purpose or object" was void for vagueness); *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (anti-noise ordinance found to satisfy due process requirements); *Palmer v. City of Euclid*, 402 U.S. 544 (1971) (municipal ordinance making criminal "any person who wanders about streets or other public ways or who is found abroad at late or unusual hours in the night without any visible or lawful business and who does not give a satisfactory account of himself" found to be unconstitutionally vague); *Coates v. Cincinnati*, 402 U.S. 611 (1971) (city ordinance making it criminal for three or more persons to "conduct themselves in a manner annoying to persons passing by" was unconstitutional on its face for vagueness).

These cases, each addressing vagueness in a different particular factual context, demonstrate the ongoing need for

this Court to continue to guide the lower courts in the application of the vagueness and overbreadth doctrines in different situations.

It must also be pointed out that very recently this Court's deeply felt concerns about the unfair application of legislation without adequately clear standards, resulting in unequal treatment of citizens, led the Court in *Bush v. Gore*, 121 S. Ct. 525 (2000), to set aside the decision of the Florida Supreme Court on the grounds that the Florida Supreme Court had issued a ruling permitting the recounting of votes in Florida without delineating sufficiently precise standards to guide the ballot counters in determining the intent of the voters as reflected on the ballots. The fear of "arbitrary treatment of voters . . . [through] the absence of specific standards" led this Court to prevent the state of Florida from manually recounting its ballots, which ended the 2000 presidential election contest. *Id.* at 530.

While the *Bush v. Gore* decision was couched in terms of equal protection under the Fourteenth Amendment, the same important concern in that case—the likelihood of the arbitrary and unequal determination of the intent of an individual, and the unequal treatment of citizens which might result—governs this case, and it requires this Court once again to reverse an unconstitutional ruling of a state supreme court and to establish clearly the need for nonarbitrary application of the law. A decision from the Court in this case would not simply correct the error of the Michigan Supreme Court, but would also

provide needed guidance to the lower courts with regard to vagueness and overbreadth principles in connection with the criminalization of communications on the Internet. The use of the Internet as a means of communication has grown exponentially over the past few years. The ramifications of the ruling of the Michigan Supreme Court, if left unchallenged, would be enormous both in Michigan—where MCL 750.145c(2); MSA 28.342a(2) has repeatedly been utilized to prosecute individuals for their Internet communications—and throughout the United States.

II.

The defects in the statute identified by the Court in *City of Chicago v. Morales* and the other recent vagueness cases decided by this Court are the same defects present in this case in MCL 750.145c(2); MSA 28.342a(2). The statute provides:

> A person who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material, or a person who arranges for, produces, makes, or finances, or a person who attempts or prepares or conspires to arrange for, produce, make, or finance any child sexually abusive activity or child sexually abusive material is guilty of a felony, punishable by imprisonment for not more than 20 years, or a fine of not more than

> $100,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know that the child is a child, or that person has not taken reasonable precautions to determine the age of the child.

The vague and ambiguous phrase, "prepares . . . to arrange for," specifies no clearly identifiable conduct and gives no guidance to either citizens or law enforcement officials as to what types of activities are prohibited by the statute. Indeed, by criminalizing the actions of someone who "prepares . . . to arrange for" a criminal activity, MCL 750.145c(2); MSA 28.342a(2) actually creates two separate levels of vagueness and ambiguity, as the language of the statute permits the conviction of not only individuals who prepare for criminal activity, but also those who take the even less affirmative or direct step of preparing to arrange for criminal activity. Such a broad and indefinite definition of criminal activity is essentially limitless and opens the door for the state to prosecute an individual based solely on his intent, without proof of a sufficient action taken by that individual which is designed to lead to the completion of a crime.

It is simply not possible, as the statute is written, to know what types of acts will constitute the "preparation" "to arrange for" child sexually abusive activity. Partly for that reason, discriminatory enforcement is a major concern with the statute, as the police have the broadest type of unlimited discretion in making arrests for activities which themselves are

wholly innocent. This is precisely why this Court struck down the ordinance in *City of Chicago v. Morales*.

Moreover, unlike the statute in *City of Chicago v. Morales*, the statute in this case plainly impinges unconstitutionally on protected First Amendment freedoms, for the statute may easily be used to criminalize protected communications by individuals which, while not a violation of any other statute, may be deemed by Michigan law enforcement officials to constitute "preparations" for child sexually abusive activity.

The overbreadth and vagueness of MCL 750.145c(2); MSA 28.342a(2) is apparent from a cursory examination of situations in which the terms of the statute could be applied. Contrary to established principles of criminal law, the broad and vague wording of the statute allows the prosecution of persons solely on the basis of their intent, without regard to whether they attempt to carry out that intent by engaging in actions which are proximate to any attempted child sexually abusive activity, and even permits prosecution and conviction of individuals for actions taken without any criminal intent at all. For example, under the reasoning adopted by the Michigan courts, any act of preparation towards the commission of child sexually abusive activity, however remote from any encounter with a real child, can constitute a felony. Thus, if an individual had formed a vague desire to engage in some form of sexual activity with a minor, but had no intention of ever acting on that desire, that individual could be prosecuted and convicted

for violating MCL 750.145c(2); MSA 28.342a(2) by simply engaging in an innocent conversation with a child, or an officer impersonating a child, on the Internet. The state could, under the statute, deem that first step of initiating a conversation with a minor as a sufficient preparatory act to warrant prosecution. It is not difficult to imagine that if the state managed to obtain some evidence of that individual's desires, perhaps by uncovering a diary entry through the use of a search warrant, the state could characterize the engaging in the conversation with a child as "preparing to arrange for" child sexually abusive activity, despite the individual's lack of any intention to act on his desires. By criminalizing any activity which may be characterized as a preparatory act, or an act which prepares to arrange for another act, the State of Michigan has transformed constitutionally protected communications into crimes. This is the essence of an overbroad statute.

In the same manner, a person without any intent to engage in any child sexually abusive activity can be unfairly subjected to prosecution and conviction under MCL 750.145c(2); MSA 28.342a(2) if his speech containing sexual innuendo may be interpreted as preparation for some sort of child sexually abusive activity. The present case falls within this second category. In such cases, an individual may engage in sexual banter anonymously on the Internet without any actual intent to engage in a prohibited sexual activity with a minor, yet find that he or she is subject to prosecution because an officer has construed his conversation as the preparation to arrange for an attempt to engage in sexual activity.

While under normal principles of criminal law, the individuals in these examples would not face prosecution unless they had taken some affirmative physical action evidencing an actual attempt to commit a crime, *see* Wayne R. LaFave & Austin W. Scott Jr., *Handbook on Criminal Law* § 59, at 431(1972), the lesser standard of the language of MCL 750.145c(2); MSA 28.342a(2), permitting prosecution for the mere preparation to arrange for a criminal act, would permit conviction for the conversations themselves.

III.

"One of the basic premises of the criminal law is that bad thoughts alone cannot constitute a crime." LaFave & Scott, *supra*, § 59, at 431; *see also* F.B. Sayre, *Criminal Attempts*, 41 Harv. L. Rev. 821 (1928). Thus, it is has been well understood for centuries that while prosecuting an individual for an attempt to commit a crime is permitted under the policy justification that society has an interest in punishing persons who act to commit a crime but are apprehended before the crime is actually completed, such an attempt must be "more than an act of preparation." LaFave & Scott, *supra*, § 59, at 431. While the commentators have noted the sometimes difficult issue of drawing a line between preparation and attempt, all have agreed that "[s]omething more than mere preparation or planning is essential." Sayre, *supra*, 41 Harv. L. Rev. at 843 (discussing common-law history of criminalization of attempts).

Prior to the enactment of MCL 750.145c(2); MSA 28.342a(2), the Michigan Supreme Court, like all other state

courts, contrasted acts of preparation from acts constituting attempts:

> Mere preparation is distinguished from an attempt in that the former consists of making arrangements or taking steps necessary for the commission of a crime, while the attempt itself consists of some direct movement *toward commission of the crime* that would lead immediately to the completion of the crime.

People v. Jones, 443 Mich. 88, 504 N.W.2d 158, 164 (1993) (emphasis added); *see also People v. Stapf*, 155 Mich. App. 491, 400 N.W.2d 656 (1986) (to prove crime of attempt, evidence must show specific intent to commit crime and overt act going beyond mere preparation toward committing crime); *People v. Frost*, 148 Mich. App. 773, 384 N.W.2d 790 (1985) (essential elements of attempt are intent to do act or bring about certain consequences which in law would amount to crime; and act in furtherance of that intent which goes beyond mere preparation). The Michigan Supreme Court stated in *People v. Coleman*, 350 Mich. 268, 86 N.W.2d 281, 285 (1957), that mere preparation to commit a crime could not be criminalized:

> "The law," as Holmes well said (The Common Law, 68), "does not punish every act which is done with the intent to bring about a crime." The purchase of a fountain pen intended for forgery would doubtless be deemed merely an

> act of preparation. Likewise, even the purchase of a hunting rifle, secretly intended for the murder of the neighbor, though equally useful for the hunting of deer. . . .
>
> . . . "There must be at least some appreciable fragment of the crime committed, and it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter."

(Quoting 1Charles E. Torcia, *Wharton's Criminal Law* 280 (12th ed.).)

The statute at issue in this case is an unprecedented effort[1] to impose criminal punishment on thoughts and on activities which heretofore have universally been understood to fall outside the sanctions of the criminal laws. By criminalizing acts which only "prepare to arrange for" criminal behavior, the State of Michigan has opened the door to prosecutions based on solely subjective standards in derogation of the well-established common-law rules regarding attempts.

---

[1]Research has revealed no statute from any other state which permits the imposition of criminal sanctions for a person who "prepares to arrange for" criminal activity.

The historical distinction between attempts and mere preparation is rooted in the requirement that individuals may be convicted only for their criminal actions and not for their criminal state of mind. The law of attempt ensures that the particular action which transforms a criminal intent into a crime is one which actually is directed toward the completion of a crime, rather than one which is so ambiguous or remote from the completion of a crime as not to be indicative of the intention to consummate the crime. This longstanding principle was stated by a former Chief Justice of the Michigan Supreme Court in *People v. Youngs*, 122 Mich. 292, 81 N.W. 114, 116 (1899), as follows:

> The two important and essential facts to be established *to convict a person of an offense*, are: First, an intent to commit the offense; and second, some overt act, consequent upon that intent, *towards its commission*. So long as the act rests in bare intention, it is not punishable. "Cogitationis poenam nemo patitur." It is only when the thought manifests itself by an outward act *in or towards the commission of an offense, that the law intervenes to punish. . . . These are fundamental legal principles.*

(Grant, C.J., dissenting opinion (emphasis added).)

This Court has previously recognized that while a unanimous historical adherence to common-law practice does

not conclusively establish it as a requirement of due process, such an adherence does "reflect a profound judgment about the way in which law should be enforced and justice administered." *In re Winship*, 397 U.S. 358, 362 (1970) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968)). In *Winship*, this Court found that the established common-law practice of requiring guilt to be proven by the "beyond a reasonable doubt" standard was strong proof that such a standard was required by the Due Process Clause.

In the same way, this Court must find that the long-established practice of the common law with regard to the degree of action needed to establish guilt for an attempt to commit a crime expresses values and principles which must be protected by the Due Process Clause of the Fourteenth Amendment. Accordingly, this Court must find that the Due Process Clause precludes states from penalizing the mere preparation or arranging for the commission of a crime.

CONCLUSION

For all of the foregoing reasons, the Petitioner, Christopher Thousand, requests this Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

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No. _____

In The Supreme Court of the United States

CHRISTOPHER THOUSAND,

Petitioner,

v.

STATE OF MICHIGAN,

Respondent.

On Petition for a *Writ* of *Certiorari* to the Michigan Supreme Court

APPENDIX

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Order **Michigan Supreme Court**

Entered: October 31, 2000 **Lansing, Michigan**

Elizabeth A. Weaver,
Chief Justice

116967 & (43) **Michael F. Cavanagh**
Marilyn Kelly
Clifford W. Taylor
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant/
Cross-Appellee,

v SC: 116967
COA: 220283

CHRISTOPHER THOUSAND, Wayne CC: 99-000798
Defendant-Appellee/
Cross-Appellant.

On order of the Court, the application for leave to appeal from the May 12, 2000 decision of the Court of Appeals is considered, and it is GRANTED. In addition to the issue raised in the applications, the parties are directed to brief the issues (1) whether legal impossibility is a viable defense under the circumstances of this case, and (2) whether the attempt statute, MCL 750.92; MSA 28.287, codified the legal impossibility defense as part of the common law of attempt, see

People v Webb, 127 Mich 29, 31-32 (1901). The application for leave to appeal as cross-appellant is also considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

J1026

[SEAL]

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court,

certify that the foregoing is a true and complete copy of the order

entered at the direction of the Court.

October 31, 2000

Corbin R. Davis

Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF, MICHIGAN,	FOR PUBLICATION May 12, 2000 9:05 a.m.
Plaintiff-Appellant,	
v.	No. 220283 Wayne Circuit Court
CHRISTOPHER THOUSAND,	LC No. 99-000798
Defendant-Appellee.	

Before: Cavanagh, P.J., and Sawyer and Zahra, JJ.
SAWYER, J.

Defendant was charged with child sexually abusive activity, MCL 750.145c; MSA 28.342a, solicitation to commit third-degree criminal sexual conduct, MCL 750.157b(3)(a); MSA 28.354(2)(3)(a) and MCL 750.520d(1)(a); MSA 28.788(4)(1)(a), and attempted distribution of obscene material to a minor, MCL 750.92; MSA 28.287 and MCL 722.675; MSA 25.254(5). The trial court granted defendant's motion to quash and dismissed the case. The people now appeal and we affirm in part and reverse in part.

In December 1998, during an undercover investigation of persons using the Internet to attempt to engage in child sexually abusive activity, Wayne County Sheriff's Deputy

William Liczbinski, an adult, entered Internet chat rooms and posed as a minor. While in a chat room, Deputy Liczbinski, posing as a fourteen-year-old girl named "Bekka," began chatting with defendant. During their correspondence, defendant made sexual comments to "Bekka," and sent "her" a picture of his penis via the Internet. Defendant told "Bekka" that he was going to "take [her] back to his home into his bedroom where we can be alone and not be bothered for sexual activity." Defendant and "Bekka" decided to meet at the McDonald's Restaurant located on Van Dyke in the City of Detroit. Defendant told "Bekka" that he would be driving a green Duster, what clothing he would be wearing for the meeting, and that he would be carrying a gift for her, a white teddy bear. When he arrived at the meeting site at the predetermined time, defendant was arrested by sheriff's deputies. Two white teddy bears were found in defendant's car.

Defendant moved to quash the information and dismiss the case, arguing that each of the charged offenses required the existence of a minor as the victim or potential victim and that it was undisputed that no minor was actually involved in this matter. The trial court agreed with defendant and granted the motion to quash. The trial court reasoned that the existence of a minor was an element of each offense with which defendant was charged and, because no such minor was involved, it was legally impossible for defendant to have committed or have attempted to commit the charged offenses.

Plaintiff's only argument involves whether it is legally or factually impossible for defendant to have committed the charged offenses where the victim was not, in fact, a fourteen-year-old girl as defendant thought, but in fact an adult male. This distinction is critical because, while legal impossibility is a defense to the crime of attempt, factual impossibility is not. *People v. Ng*, 156 Mich. App. 779, 786; 402 N.W.2d 500 (1986); *see also People v. Tinskey*, 394 Mich. 108; 228 N.W.2d 782 (1975); *People v. Cain*, 23 8 Mich. App. 95, 117-118; 605 N.W.2d 28 (1999). Although this is the only issue raised by plaintiff, we believe that the analysis differs with each of the three charged offenses. Accordingly, we will analyze each offense separately.

To begin, the issue of factual versus legal impossibility presents a question not unlike the ancient quandary of whether a glass is half empty or half full. As Dressler states in *Understanding Criminal Law*, §§ 27.07[D][3][a], pp. 374-375 (2d ed.), the distinction can be very subtle:

> *Ultimately any case of hybrid legal impossibility may reasonably be characterized as factual impossibility*. That is, applying the definition of "factual impossibility" set out above in subsection [C][1], in each case *D*'s intended end (e.g., to receive stolen property; to pick a human pocket; to bribe a juror; to kill a human; to hunt a deer out of season) constituted a crime, but she failed to consummate the

offense because of some fact of which *D* was unaware or was beyond her control. Thus, by skillful characterization, one can describe virtually any case of hybrid legal impossibility, which is a common law defense, as an example of factual impossibility, which is *not* a defense. [Emphasis in original.]

Professor Dressler summarizes factual impossibility, *id.*, at §§ 27.07[C][1], p. 370, as follows:

"Factual impossibility" exists when a person's intended end constitutes a crime, but she fails to consummate the offense because of an attendant circumstance unknown to her or beyond her control. Examples of factual impossibility are: (1) a pickpocket putting her hand in the victim's empty pocket; (2) an abortionist beginning the surgical procedure on a nonpregnant woman; (3) an impotent male trying to have nonconsensual sexual intercourse; (4) an assailant shooting into an empty bed where the intended victim customarily sleeps, or pulling the trigger of an unloaded gun aimed at a person who is present.

In each of these examples the actor was mistaken regarding some fact relating to the victim, herself or himself and/or the method of

commission. More specifically, the target offense was not consummated because the actor chose the wrong victim (the pickpocket and abortion cases), the victim was not present (the empty bed case), the actor was not physically capable of committing the offense (the impotency case), or inappropriate means were used to commit the crime (the unloaded gun case). Had the circumstances been as the actors believed them to be, or hoped that they were (e.g., the pocket contained property; the woman was pregnant; the victim was in the bed; the actor was physically capable of having intercourse; the gun was loaded), the crimes would have been consummated.

It should not be surprising that lawmakers are unsympathetic to claims of factual impossibility. In each of the cases described above, the actor has demonstrated her or his dangerousness (critical to subjectivists) and manifested criminality (important to objectivists). No good reason exists to recognize a defense merely because a person chooses her victim badly, does not use proper means to commit the crime, or for some other reason unrelated to her culpability does not successfully commit the offense.

Dressler summarizes legal impossibility as follows, *id.* at §§ 27.07[D][3][a], pp. 373-374:

> Hybrid legal impossibility (or what courts will simply call "legal impossibility") exists if the actor's goal is illegal (thus, distinguishing itself from pure legal impossibility), but commission of the offense is impossible due to a *factual* mistake by her regarding the *legal* status of some attendant circumstance relevant to her conduct. As the preceding definition implies and as is clarified immediately below, this is a hybrid version of impossibility: the actor's impossibility claim includes both legal and factual aspects to it.
>
> Courts have recognized a defense of legal impossibility or have stated that it would exist if *D*: (1) receives *un*stolen property believing that it was stolen; (2) tries to pick the pocket of a stone image of a human; (3) offers a bribe to a "juror" who is not a juror; (4) tries to hunt deer out of season by shooting a stuffed animal; (5) shoots a corpse believing that it is alive; or (6) shoots at a tree stump believing that it is a human.
>
> Notice that each of the mistakes in these cases affected the legal status of some aspect of

the defendant's conduct. A person is not guilty of "receiving stolen property with knowledge that it is stolen" unless the property is "stolen" in character. Likewise, one cannot legally bribe a juror unless the person bribed is a juror. The status of a victim as a "human being," rather than as a corpse, tree stump, or statue, legally is necessary to commit the crime of murder or to "take and carry away the personal property *of another*." Finally, putting a bullet into a stuffed deer cannot legally constitute the crime of killing a deer out of season.

On the other hand, in each of the preceding examples of hybrid legal impossibility, *D* was mistaken about a fact: whether the property had been stolen; whether a person was a juror; whether the victims were living human beings; or whether the victim was an animal subject to being hunted out of season. [Emphasis in original.]

This brings us back to the original point from Professor Dressler that we quoted: cases may be reasonably characterized as either factually or legally impossible. One distinction we do note between Dressler's examples of legal and factual impossibility is this: in the legal impossibility cases, the intended object of the defendant's actus reus could *not* possibly

support the crime, while in the factual impossibility cases the object of the actus reus *could* have been the victim of a crime.

Taking the examples of legal impossibility, the property the defendant intended to receive was not, in fact, stolen and therefore could not form the basis of receiving stolen property; the intended victim of the pickpocket was, in fact, a stone statue, which cannot be the victim of a theft; the person the defendant intended to give money to was not a juror, and therefore could not be a bribed juror; the defendant intended, in fact, to shoot the object which turned out to be a stuffed deer and a stuffed deer cannot be taken out of season; the defendant intended to shoot the object which was, in fact, a corpse or the object which was, in fact, a tree stump and neither a corpse nor a tree stump may be the victim of a homicide. In each of these cases, the defendant accomplished the actual act he set out to do. He received the property he intended to receive, he picked the pocket he intended to pick, he gave money to the person to whom he intended to give the money, and he shot the object he intended to shoot. While upon learning the full facts of the situation, the defendant may be disappointed in the results, he nevertheless committed the act he intended to commit.

Turning to the examples of factual impossibility, if the victim's pocket had had a wallet, the victim would have suffered a theft; if the woman were pregnant, there would have been an abortion; if the defendant had not been impotent, the victim would have been raped; if the victim had been in the location where the defendant shot, or if the gun had been

loaded, the victim would have suffered the wound. In each of these cases, the defendant did *not* accomplish the intended task. He did not remove anything from the victim's pocket, he did not abort the fetus, he failed to have intercourse with the victim, and failed to shoot the victim.

Turning then to the case at bar, we believe that defendant's conduct with respect to two of the charges represents legal impossibility and, therefore, the trial court properly dismissed the charges. However, with respect to one of the charges, we believe the trial court improperly dismissed the charge.

First, we consider the offense of solicitation of criminal sexual conduct in the third degree. MCL 750.157b(3)(a); MSA 28.354(2)(3)(a) and MCL 750.520d(1)(a); MSA 28.788(4)(1)(a). The form of CSC-3 charged is engaging in sexual penetration with a person under the age of sixteen.[1] We believe that this represents a case of legal impossibility from both the solicitation aspect and the CSC-3 aspect. First, with respect to the CSC-3 element, MCL 750.520d(1)(a); MSA 28.788(4)(1)(a) requires that the defendant engage in sexual penetration with a victim who is at least thirteen years of age and under sixteen. While defendant desired to engage in sexual

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[1]Plaintiff argued below that the existence of a minor was not an essential element to this count. While it is true that, in general terms, the victim of CSC-3 need not be a minor, a minor victim is essential to specific provisions of the CSC-3 statute alleged in this case.

activity with a fourteen- year-old girl, the actual object of his desire was, in fact, an adult male, Deputy Liczbinski. The person to whom defendant actually made the offer of sexual relations was over the age of sixteen. If defendant had actually engaged in sexual penetration with the person to whom he made the offer (Deputy Liczbinski), he would not have violated MCL 750.520d(1)(a); MSA 28.788(4)(1)(a). It is similar to the poaching the stuffed deer case. Just as it is not poaching to shoot a stuffed deer, it is not a violation of MCL 750.520d(1)(a); MSA 28.788(4)(1)(a) to engage in consensual sexual intercourse with an adult.

Turning to the issue of solicitation, MCL 750.157b; MSA 28.354(2) provides in pertinent part as follows:

> (1) For purposes of this section, "solicit" means to offer to give, promise to give, or give any money, services, or anything of value, or to forgive or promise to forgive a debt or obligation.
>
> * * *
>
> (3) Except as provided in subsection (2), a person who solicits another person to commit a felony, or who solicits another person to do or omit to do an act which if completed would constitute a felony, is punishable as follows [.]

What is lacking here is defendant's request to another person to commit a crime. "Bekka," the fourteen-year-old female online persona of Deputy Liczbinski, was not asked to commit a crime. That is, while it would be a crime for defendant to engage in sexual intercourse with a fourteen-year-old girl, a fourteen-year-old girl is not committing a criminal offense (or at least not CSC-3) by engaging in sexual intercourse with an adult. Thus, whether we look at this case as defendant asking fourteen-year-old "Bekka" to engage in sexual intercourse with him or as defendant asking Deputy Liczbinski to engage in sexual intercourse with him, he did not ask another person to commit CSC-3. That is, it is legally impossible for a person to violate MCL 750.520d(1)(a); MSA 28.788(4)(1)(a) by engaging in sexual intercourse with defendant.

For the above reasons, we conclude that the trial court properly dismissed the charge of solicitation to commit criminal sexual conduct.

Turning next to the charge of attempted disseminating or exhibiting sexual material to a minor, we again find the crime to be legally impossible under the facts of this case. MCL 722.675(1); MSA 25.254(5)(1) provides as follows:

> A person is guilty of distributing obscene matter to a minor if that person does either of the following:

(a) Knowingly disseminates to a minor sexually explicit visual or verbal material that is harmful to minors.

(b) Knowingly exhibits to a minor a sexually explicit performance that is harmful to minors.

Further, MCL 722.671(c); MSA 25.254(1)(c) defines "minor" as a person under eighteen years of age.

Defendant's conduct at issue is the e-mailing of a picture of his penis to "Bekka." Thus, while defendant believed he was sending the picture to a fourteen-year-old girl named Bekka, he in fact was sending it to an adult male named Deputy Liczbinski. We believe that this, too, falls within the area of legal, rather than factual, impossibility. The e-mail was sent to its intended recipient: a person whose chat-room screen name was "Bekka." Because "Bekka" was, in fact, an adult, an essential requirement of the statute was not met: dissemination to a minor.

In fact, this case is very similar to an example of legal impossibility used by Professor Dressler. Dressler, *supra* at §§ 27.07[A], p. 369, posed the question of two cases. In each case, the male defendant had sexual intercourse with a seventeen-year-old female in a jurisdiction where the age of consent was sixteen. Therefore, statutory rape did not occur in either case. However, the first defendant erroneously believed the girl was

fifteen and, therefore, believed (erroneously) that he had committed statutory rape. The second defendant, on the other hand, knew the girl was seventeen, but erroneously believed the age of consent was eighteen, thus also incorrectly thinking that he had committed statutory rape. Thereafter, Professor Dressler points out that the second defendant is not guilty of a crime because it is not a crime to commit an act which a person erroneously believes is against the law (called "pure legal impossibility"). Dressler, *supra* at §§ 27.07[D][2], p. 373, n.144. Professor Dressler then goes on to point out that the first defendant also is not guilty of statutory rape under a legal impossibility analysis:

> Consider, as well, the hypothetical in subsection [A], *supra*, in which *D1* has intercourse with a female old enough to consent, although he believed that she was underage. This examples involves hybrid legal impossibility: *D1* was mistaken about a fact (the girl's age); but her age is of legal significance in that sexual intercourse with a 17-year-old female (her true age) does not constitute statutory rape. [*Id.* at §§ 27.07[D][3][a], p. 374, n.152.]

The exact same circumstance exists here: defendant was mistaken about "Bekka's" age, but Bekka's age is of legal

significance in that distributing sexually explicit material to an adult does not violate the statute defendant is charged under.[2]

Therefore, for the above reasons, we conclude that it is legally impossible to violate MCL 722.675(1); MSA 25.254(5)(1) by distributing obscene material to an adult and, therefore, it does not constitute an attempted violation of that statute to distribute obscene material to a person the defendant believes is a minor, but who is, in fact, an adult. Accordingly, the trial court properly dismissed this charge.

Finally, we turn to the most serious charge against defendant, child sexually abusive activity. MCL 750.145c; MSA 28.342a provides in pertinent part as follows:

> (1) As used in this section:
>
> (a) "Child" means a person who is less than 18 years of age . . . .
>
> * * *
>
> (e) "Listed sexual act" means sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual

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[2]Defendant was also mistaken about "Bekka's" sex, but it is not legally significant whether Bekka was a male or a female.

involvement, sexual excitement, or erotic nudity.

* * *

(h) "Child sexually abusive activity" means a child engaging in a listed sexual act.

* * *

(2) A person who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material, or a person who arranges for, produces, makes, or finances, or *a person who* attempts or *prepares* or conspires *to arrange for*, produce, make, or finance *any child sexually abusive activity* or child sexually abusive material is guilty of a felony, punishable by imprisonment for not more than 20 years, or a fine of not more than $100,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know that the child is a child, or that person has not taken reasonable precautions to determine the age of the child. [Emphasis added.]

If the child sexually abusive activity statute merely punished actually engaging in child sexually abusive activity and, therefore, defendant was charged with attempted child sexually abusive activity, we would likely have to conclude that this again presented a case of legal impossibility. It would present the same case as distributing obscene material to a minor: the existence of a minor is legally significant and the fact that the intended recipient turned out to be an adult renders it legally impossible to have committed the crime. Similarly, it would be legally impossible to engage in child sexually abusive activity if the individual with whom the defendant intends to engage in such activity is not, in fact, a child.

However, the child sexually abusive activity statute is not so narrowly drawn. As the portion of the statute emphasized above indicates, a person may violate the statute by *preparing* for any child sexually abusive activity. It is, of course, ultimately for the jury to decide if the conduct defendant proposed to "Bekka" constituted child sexually abusive activity and whether defendant did, in fact, prepare to engage in such activity. That is, we are not called upon in this case to determine whether defendant would be guilty of the charged offense if, in fact, "Bekka" had been a fourteen-year-old girl.

Our analysis assumes, without deciding, that defendant would, in fact, be guilty of child sexually abusive activity if "Bekka" had been a fourteen-year-old girl as defendant thought rather than the adult male that Deputy Liczbinski really is. The

question before us is whether it makes a difference to the issue of defendant's guilt that "Bekka" is, in fact, an adult rather than a fourteen-year-old girl. We conclude that it does not.

Because the child sexually abusive activity statute only requires mere preparation, rather than actual abusive activity, we are satisfied that a situation such as the case at bar comes within the provision of the statute. Black's Law Dictionary (5th ed.), pp. 1063-1064, defines "preparation" as follows:

> With respect to criminal offense, consists in devising or arranging means or measures necessary for its commission, while attempt is direct movement toward commission after preparations are made.

We do not believe that it is legally significant that "Bekka" was an adult rather than a child in determining whether defendant made preparations to engage in child sexually abusive activity.

It does not change the fact that defendant was endeavoring to find a child, to entice a child to engage in sexual activity, or to arrange to meet a child for sexual activity. Assuming defendant's conduct constitutes preparing to arrange for child sexually abusive activity in general terms, then defendant engaged in such conduct whether "Bekka" was a fourteen-year-old girl or an adult male. In either case, defendant was preparing to arrange for child sexually abusive activity by

chatting with and enticing someone he believed to be a child. The fact that "Bekka" was not a child merely means that defendant would not ultimately be successful in engaging in child sexually abusive activity.

Defendant's criminal responsibility, however, is not premised upon his success, but upon his preparations. Defendant relies on the Supreme Court's decision in *Tinskey, supra*. However, we believe that defendant's reliance on *Tinskey*, at least with respect to the child sexually abusive activity charge, is misplaced. In *Tinskey*, the Court held that the defendant is not guilty of conspiracy to commit abortion where the woman upon whom the abortion was to be performed was not, in fact, pregnant.[3] The Supreme Court concluded that the defendants could not be guilty because Michigan's abortion statute requires that a woman be pregnant.[4] That analysis would support our conclusions with respect to the CSC and obscene material charges: those statutes actually require conduct involving a minor, just as Michigan's abortion statute requires conduct involving a pregnant woman. However, *Tinskey* is inapplicable to the child sexually abusive activity statute because that statute does not actually require conduct involving a minor. Rather, it only requires that the defendant prepare to arrange for child sexually abusive activity. The statute does not

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[3]She was, in fact, a policewoman who was not pregnant. *People v Tinskey*, 49 Mich. App. 497, 499; 212 N.W.2d 263 (1973).

[4]"Any person who shall wilfully administer to any pregnant woman . . . ." MCL 750.14; MSA 28.204.

require that those preparations actually proceed to the point of involving a child.[5]

For the above reasons, we conclude that defendant may be guilty of child sexually abusive activity even though "Bekka" proved to be an adult rather than a child. Accordingly, the trial court erred in dismissing that charge based upon the doctrine of legal impossibility.

Affirmed in part, reversed in part and remanded to the trial court with instructions to reinstate the child sexually abusive activity count. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra

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[5]We note that *Tinskey* is seemingly at odds with cases Dressler relies upon in classifying an abortion on an unpregnant woman as factual impossibility rather than legal impossibility. However, *Tinskey* points out that abortion statutes fall into two categories: those that require the woman to be pregnant and those that do not. The *Tinskey* decision is specifically premised upon the fact that Michigan's abortion statute requires the involvement of a pregnant woman. Factual impossibility would apply to those cases where the applicable abortion statute does not make pregnancy an element of the offense.

RULING OF THE TRIAL COURT

DECISION OF
WAYNE COUNTY CIRCUIT COURT
Judge Deborah A. Thomas
May 28, 1999

Part of the statutory language of a crime requires that there be an existence of an individual that meets the legal definition. In the scenario that was presented to this Court, there was not an individual, a person who met the legal definition, the classification required by statute to fulfill all the elements of the crime, therefore it was legally impossible for this crime to have been committed under the factual scenario that was submitted. Therefor, it cannot attempt to complete a crime that was—could not be completed legally. If you couldn't commit the crime legally, you couldn't attempt to commit the crime legally because the elements were not there. The Court as a matter of law and in keeping with the law will grant the motion.

EXCERPT FROM THOUSAND'S APPLICATION TO MICHIGAN SUPREME COURT FOR LEAVE TO APPEAL AS CROSS-APPELLANT

QUESTIONS PRESENTED FOR REVIEW

1. Can a defendant be convicted of (1) preparing or attempting to commit a child sexually abusive activity, (2) solicitation of criminal sexual conduct involving a child, or (3) attempted distribution of obscene material to a child, each of which requires the existence of a minor victim or potential victim as an element of the crime, where the defendant had no contact or interaction with a child, but rather communicated only with an adult police officer?

2. Should the defense of impossibility be abandoned, as is urged by the state?

3. Does this Court have the authority to take away the defense of impossibility in this case or any other case, in light of the failure of the legislature to enact a statutory ban on the defense of impossibility?

4. Can the state constitutionally criminalize the mere preparation for the commission of a crime?